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Nguyen Quoc Tuan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05(M)-186–07 OF 2015
TENGKU MAIMUN, ZAKARIA SAM AND ZAMANI A RAHIM JJCA
7 SEPTEMBER 2016

C

Criminal Law — Dangerous Drugs — Trafficking of dangerous drugs — Appellant convicted of trafficking drugs and sentenced to death — Appellant appealed against decision — Whether learned judge misdirected himself in finding appellant in both actual possession and presumed possession of dangerous drugs — Whether learned judge erred in ruling appellant trafficking under s 2 of the Dangerous Drugs Act 1952 without first making finding that appellant in possession of drugs — Dangerous Drugs Act 1952 ss 2, 12(2), 39A(2), 39B(1)(a) & (2)

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The appellant was charged with the offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s 39B(2) of the same Act. The respondent case was that drug which was later confirmed by the chemist as methamphetamine was found in the appellant's luggage during an inspection at the Sultan Ahmad Shah Airport, Kuantan. The appellant was travelling from Delhi to Kuala Lumpur and then to Kuantan. The appellant's defence was that, he was an innocent carrier. The appellant contended that the luggage was given to him by his friend called Tuong Thank Chuk. The trial judge found the appellant guilty of the offence and sentenced the appellant to death, hence this appeal. The issues for decision were: (a) whether the learned judge misdirected himself in finding that the appellant was in both actual possession and presumed possession of the dangerous drugs; and (b) whether the learned judge erred in ruling that the appellant was trafficking under s 2 of the DDA without first making a finding that the appellant was in possession of the same.

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Held:

(1) The learned trial judge's finding in paras 18 and 34 of his grounds of judgment made it apparent that he had also invoked, albeit in the alternative, presumed possession under s 37(d) of the DDA. This approach offended the principle of law that he ought not to rely on the alternative but to make an affirmative finding of mens rea possession or presumed possession of the dangerous drugs. The learned trial judge had

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misdirected himself in finding that there was mens rea possession and in invoking the presumption of possession under s 37(d) of the DDA at the same time (see paras 32–33).

(2) It is trite that to prove charge of trafficking under s 39B(1)(a) of the DDA punishable under s 39B(2) thereof, it is essential to prove trafficking of the dangerous drugs and in proving trafficking, the prosecution must first prove possession of the said drugs, be it under s 37(d) of the DDA or mens rea possession. The learned trial judge erred in law in finding that the appellant was trafficking without first making a ruling that the appellant had possession of the dangerous drugs (see paras 35 & 37).

[Bahasa Malaysia summary

Perayu dituduh dengan kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), yang boleh dihukum di bawah s 39B(2) Akta yang sama. Kes responden adalah bahawa dadah yang kemudiannya disahkan oleh ahli kimia sebagai methamphetamine yang diperolehi di dalam beg perayu semasa pemeriksaan di Lapangan Terbang Sultan Ahmad Shah, Kuantan. Perayu melancong dari Delhi ke Kuala Lumpur dan kemudiannya ke Kuantan. Pembelaan perayu adalah bahawa, dia adalah pembawa tak bersalah. Perayu berhujah bahawa beg diberikan kepadanya oleh kawannya yang bernama Tuong Thank Chuk. Hakim mahkamah perbicaraan mendapati perayu bersalah terhadap kesalahan dan menjatuhkan hukuman mati terhadap perayu, maka rayuan ini. Isu-isu untuk keputusan adalah: (a) sama ada hakim perbicaraan yang bijaksana tersalah arah dirinya dalam mendapati bahawa perayu berada dalam kedua-dua keadaan milikan sebenar dan milikan yang dianggap terhadap dadah berbahaya tersebut; dan (b) sama ada hakim bicara tersilap dalam memutuskan bahawa perayu adalah mengedar dadah di bawah s 2 ADB tanpa pada mulanya membuat dapatan bahawa perayu adalah memilikinya.

Diputuskan:

(1) Dapatan hakim perbicaraan dalam perenggan 18 dan 34 alasan penghakimannya membuatnya jelas yang dia juga membangkitkan, walaupun dalam alternatif, milikan anggapan di bawah s 37(d) ADB. Pendekatan ini melanggar prinsip undang-undang yang beliau tidak patut menggunanya dalam alternatif tetapi untuk membuat dapatan afirmatif milikan mens rea atau milikan anggapan terhadap dadah berbahaya. Hakim perbicaraan yang bijaksana telah tersalah arah dirinya dalam mendapati bahawa milikan mens rea dalam membangkitkan anggapan milikan di bawah s 37(d) ADB pada masa yang sama (lihat perenggan 32–33).

(2) Adalah nyata bahawa untuk membuktikan tuduhan mengedar dadah di bawah s 39B(1)(a) ADB boleh dihukum di bawah s 39B(2), adalah

penting untuk membuktikan pengedaran dadah berbahaya dan dalam membuktikan pengedaran dadah, pihak pendakwaan mesti pertamanya membuktikan milikan terhadap dadah tersebut, sama ada di bawah s 37(d) ADB atau milikan mens rea. Hakim perbicaraan yang bijaksana tersilap dari segi undang-undang dalam mendapati bahawa perayu mengedar dadah tanpa pertamanya membuat keputusan bahawa perayu telah memiliki dadah berbahaya tersebut (lihat perenggan 35 & 37).]

Notes

For cases on trafficking of dangerous drugs, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 976–980.

Cases referred to

Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408; [2014] 4 CLJ 406, CA (refd)
Soorya Kumar a/l Narayanan @ Narayanasamy v PP [2011] 5 MLJ 774; [2009] 6 CLJ 257, CA (refd)
Ugonna Philip Nwankwo v PP [2016] 4 MLJ 244; [2016] 2 CLJ 247, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), 37(da), 39A(2), 39B(1)(a), 39B(2), First Schedule

Appeal from: Criminal Trial No 45A-7–04 of 2014 (High Court, Kuantan)

Kitson Foong (Kit & Assoc) for the appellant.
Nadia Hanim bt Mohd Tajuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant, a male Vietnamese was convicted and sentenced to death by the High Court for the offence of trafficking in dangerous drugs. The charge against the appellant reads:

> Bahawa kamu pada 25 Oktober 2013, jam lebih kurang 7.55 petang di hadapan pintu perkarangan Dataran Awam, Lapangan Terbang Sultan Ahmad Shah ('LTSAS'), di dalam daerah Kuantan, di dalam negeri Pahang Darul Makmur, telah didapati mengedarkan dadah berbahaya iaitu Methamphetamine sejumlah berat 2,293 gram dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] Aggrieved by the conviction and sentence, the appellant appealed to this court. We had unanimously allowed the appeal. We set aside the conviction and sentence of the High Court and we convicted the appellant under s 12(2) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39A(2) thereof. Having heard learned counsel and learned DPP, we sentenced the appellant to 20 years imprisonment with effect from the date of arrest and ten strokes of whipping. We now give our reasons for the said decision.

THE PROSECUTION'S CASE

[3] On 25 October 2013 at about 7.55pm, ASP Hasbullah Ali bin Alias ('SP4') was on surveillance duties with several other police personnel at the Sultan Ahmad Shah Airport ('the airport') when he spotted the appellant, looking rather suspicious. The appellant who had an appearance of 'a woman' was carrying a luggage with a brand name 'Polo House USA' ('exh P17') and a sling bag ('exh P18'). The appellant was looking around before approaching the customs officer.

[4] SP4 stopped the appellant in front of the main entrance of the arrival hall. SP4 inspected exh P17 after it was opened with the combination number 000 given by the appellant. SP4 found several ladies undergarments and clothing in P17. SP4 noticed that the inner part of P17 had been modified as when he pressed the upper and bottom parts of the luggage, there was a suspicious sound.

[5] SP4 proceeded to rip open the upper part of the luggage P17 where he found one plastic packet containing crystal powdery substance suspected to be dangerous drugs ('exh P9'). Similar item ('exh P10') was found at the bottom of the luggage P17.

[6] Inside the sling bag exh P18, SP4 found a Vietnamese passport in the name of the appellant ('exh P18(A)'), a report of lost luggage ('exh P18(B)'), a boarding pass MH091 from Delhi to Kuala Lumpur ('exh P18(C)'), a boarding pass MH1268 from Kuala Lumpur to Kuantan ('exh P18(D)') and several other documents.

[7] An officer with MAS, Razman bin Yusof ('SP6') had received the report ('exh P18(B)') from the appellant on his lost luggage, P17.

[8] When the luggage P17 arrived at Kuantan from Kuala Lumpur, based on the flight number and the details of the luggage that were given by the appellant, SP6 handed exh P17 to the appellant who came to collect the same from SP6. According to SP6, the appellant admitted that P17 belonged to him.

[9] Upon analysis by the chemist, Suriani bt Mat Yasin ('SP3'), the substances in exhs P9 and P10 were confirmed to be methamphetamine, weighing 2293.3g. Methamphetamine is listed under the First Schedule of the Act.

Findings at the end of the prosecution's case

[10] From the direct evidence adduced by the prosecution, the learned trial judge made a finding that the appellant had mens rea possession of the drugs.

[11] Relying on the fact that the appellant was travelling from Delhi to Kuala Lumpur before his arrival in Kuantan and by the act of the appellant carrying the drugs in his luggage exh P17, the learned trial judge found that the element of trafficking had been established under s 2 of the Act.

[12] Having found that the prosecution had made out a prima facie case, the appellant was called upon to enter his defence.

THE DEFENCE

[13] In his evidence given under oath, the appellant essentially put up a defence of innocent carrier. He stated that he went to India with a female friend called Tuong Thank Chuk ('Chuk'). Chuk had offered the appellant a job in her house in India as a maid. After being in Chuk's house for ten days, the appellant returned to Vietnam as his grandmother was sick. Thereafter, the appellant went back to India. All the expenses to India were paid for by Chuk.

[14] After two weeks at Chuk's house, the appellant was asked by Chuk to go to Malaysia to work with Chuk's friend, as Chuk was moving out. Before departing for Delhi on 23 October 2013, Chuk gave the luggage P17 to the appellant.

[15] The appellant arrived in Kuala Lumpur on 24 October 2013 and he flew to Kuantan the same day. Upon his arrival in Kuantan, the appellant found that the luggage P17 did not arrive. He made a report on the missing luggage. When he was making the report, Chuk contacted him where he informed Chuk about the missing luggage.

Findings at the close of the case

[16] The learned trial judge dismissed the defence as being a bare denial and an afterthought. His Lordship found that the version on Chuk was never raised by the appellant to the police when he was arrested but was only raised during

the trial. Further, the appellant's version on Chuk's call to him when he was making the report was never put to SP6.

[17] The appellant's version on the purpose of his trips to India and Kuantan, namely to work as a maid was also not accepted by the learned trial judge for the reason that the appellant had the experience in entertainment and beauty salon. Given that the appellant had failed to state precisely who he was meeting, where he was going and how he was going to meet Chuk's friend in Kuantan, the learned trial judge found Chuk to be an invention of the appellant's defence.

[18] The learned trial judge thus concluded that the defence had failed to raise a reasonable doubt on the prosecution's case and had also failed to rebut the presumption of s 37(d) of the Act and that the prosecution had proved its case beyond reasonable doubt. The appellant was thus convicted and sentenced to death.

THE APPEAL

[19] Learned counsel for the appellant raised the following issues:

(a) that the learned judge misdirected himself in finding that the appellant was in both actual possession and presumed possession of the dangerous drugs; and

(b) that the learned judge erred in ruling that the appellant was trafficking under s 2 of the Act without first making a finding that the appellant was in possession of the same.

[20] In support of his submission on the first issue, learned counsel relied on among others, *Soorya Kumar a/l Narayanan @ Narayanasamy v Public Prosecutor* [2011] 5 MLJ 774; [2009] 6 CLJ 257 and *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406.

[21] As for the second issue, learned counsel's submission was that the grounds of judgment of the learned trial judge revealed that he made no affirmative finding that the appellant was found in possession of dangerous drugs before ruling that the appellant was trafficking under s 2 of the Act.

[22] In the light of the misdirection, learned counsel prayed that the appellant be convicted under s 12(2) punishable under s 39A(2) of the Act.

[23] In response, learned DPP submitted that there was no misdirection or error by the learned trial judge. On the first issue, learned DPP attempted to

distinguish the instant appeal with *Soorya Kumar*. It was her submission that in *Soorya Kumar*, the trial judge invoked s 2 as well as s 37(da) of the Act which was wrong, whilst in the instant appeal, the learned trial judge had clearly invoked s 37(d) and s 2 of the Act.

[24] In respect of the second issue, learned DPP agreed that the learned trial judge had failed to make a finding on possession prior to him holding that the appellant was trafficking under s 2 of the Act. Nonetheless, learned DPP submitted that the omission was not fatal and hence urged the court to dismiss the appeal.

OUR DECISION

Mens rea possession and presumed possession

[25] In *Soorya Kumar*, Ahmad Maarop JCA (now FCJ) said at p 781 (MLJ); p 269 (CLJ):

> ... in *Lim Hock Boon v Public Prosecutor* [2007] 4 CLJ 114 at p 124, this court said:
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> > The principle to be extracted from Chia Leong Foo is that once the prosecution elects to rely on one of the statutory presumptions in s 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s 2 of the Act. That is exactly the position here. Throughout its case, the prosecution proceeded on the basis that it was relying on s 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammelled definition in s 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused.
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> [18] At the conclusion of the submission before us, commenting on the judgment in the court below, the learned counsel for the accused said that the learned trial judge was confused. We agree. The learned judge seriously misdirected himself and leaves us in serious doubt as to whether at the close of the prosecution's case he was relying on the statutory presumptions under s 37 of the Act or the proof of actual act of trafficking as defined under s 2 of the Act. In our view, the benefit of the doubt must be given to the accused.

[26] From the decision in *Soorya Kumar* and a few other cases cited by learned counsel which we find no necessity to reproduce, the principle of law that could be distilled is that once a trial judge had made a finding of actual possession or trafficking, he cannot invoke the presumption either under s 37(d) or 37(da) of the Act and vice versa.

[27] It is therefore pertinent to scrutinise the judgment of the learned trial judge to ascertain his finding on possession, namely whether he had made a finding of actual or mens rea possession or whether he had invoked presumed

possession under s 37(d) of the Act or whether he had relied on both mens rea and presumed possession.

[28] For that purpose, we reproduce below the grounds of judgment of the learned trial judge (appeal record Vol 1 pp 13–15):

> [15] ... Dari keterangan SP4 dan SP5 yang melihat Tertuduh bersama beg P17 yang mengandungi dadah tersebut serta keterangan SP6 yang menyatakan Tertuduh mengesahkan beg P17 adalah kepunyaannya serta terdapat pakaian kepunyaan Tertuduh *(P17(1) hingga P17(16))* menunjukkan Tertuduh mempunyai kawalan dan jagaan beg P17 tersebut yang mengandungi dadah. Pegawai Penyiasat SP7 telah membuat acu pakai pakaian yang terdapat dalam beg P17 dan muat dengan saiz tubuh Tertuduh seperti dalam gambar-gambar di P10. Walaupun ada sebahagian pakaian menyerupai pakaian wanita tapi ia muat dipakai oleh Tertuduh. Tidak menghairankan pakaian itu adalah kepunyaan Tertuduh kerana Tertuduh mempunyai perwatakan seorang wanita seperti dikatakan oleh SP4, SP5 dan SP6. Disamping itu menurut SP6 setiap bagasi yang tercicir MLO akan simpan dipejabat MLO dan akan beri nombor rujukan dan bagasi tidak boleh dibuka. Dalam kes ini tidak ada keterangan yang menunjukkan bahawa pada bila-bila masa beg P17 ini pernah dibuka atau diganggu. Dengan itu amat jelas sekali Tertuduh mempunyai kawalan dan jagaan atas beg P17 yang mengandungi dadah tersebut.
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> [16] Tertuduh juga mempunyai pengetahuan tentang ujudnya dadah dalam beg P17 itu. Dari keterangan SP4 membayangkan Tertuduh tahu dadah tersebut. Keterangan-keterangan SP6 dan SP5 serta SP7 menunjukkan pengetahuan Tertuduh yang boleh dilihat dari fakta dan keterangan berikut:
>
> (a) terdapat pakaian-pakaian kepunyaan Tertuduh didalam beg P17;
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> (b) keadaan Tertuduh semasa menarik beg P17 pada mula-mulanya dilihat oleh SP4 dan SP5 di balai ketibaan yang mencurigakan dengan memandang ke kiri dan ke kanan serta memandang sekeliling;
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> (c) keadaan Tertuduh yang kelihatan terkejut dan takut ketika SP4 memeriksa beg P17 dan menunjukkan serta menekan bahagian atas dan bawah beg yang tersorok dadah tersebut;
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> (d) cara bagaimana dadah itu disembunyikan di dalam beg P17 di bahagian yang telah diubah suai dibahagian atas dan bawah di dalam beg itu yang mana tidak akan disyaki oleh sesiapa yang melihat beg P17 tersebut;
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> [17] Berdasarkan fakta-fakta ini menunjukkan Tertuduh mempunyai pengetahuan tentang wujudnya dadah methamphetamine dalam beg P17 tersebut. Dengan milikan beg dan pengetahuan tertuduh mengenai dadah itu, menunjukkan Tertuduh mempunyai pemilikan 'mens rea' bagi dadah dalam beg P17 tersebut yang membuktikan Tertuduh telah melakukan kesalahan pengedaran dadah.

[29] From the above, it was crystal clear that the learned trial judge had made a finding of mens rea or actual possession.

[30] The submission of learned DPP that the learned trial judge found presumed possession under s 37(d) of the Act was premised on the following paragraphs of the grounds of judgment:

> [18] Tertuduh juga boleh dianggap mempunyai milikan dan pengetahuan mengenai dadah itu, di dalam hal keadaan kes ini, dengan mengguna pakai anggapan dibawah seksyen 37(d) Akta Dadah Berbahaya 1952.
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> Dengan itu Mahkamah mendapati pihak Tertuduh telah gagal menimbulkan sebarang keraguan yang munasabah terhadap kes pihak Pendakwaan, dan juga telah gagal mematahkan anggapan dibawah seksyen 37(d) Akta Dadah Berbahaya 1952.

[31] With respect to learned DPP, the above finding did not detract from the fact that the learned trial judge found that the appellant had mens rea possession of the drugs as alluded to in paras 15–17 of his grounds of judgment.

[32] The finding of the learned trial judge in paras 18 and 34 of his grounds of judgment made it apparent that he had also invoked, albeit in the alternative, presumed possession under s 37(d) of the Act. This approach, with respect, offended the principle of law that he ought not to rely on the alternative but to make an affirmative finding of mens rea possession or presumed possession of the dangerous drugs (see *Seyedalireza*; *Ugonna Philip Nwankwo v Public Prosecutor* [2016] 4 MLJ 244; [2016] 2 CLJ 247).

[33] In the circumstances, we found merits in the submission of learned counsel on the first issue that the learned trial judge had misdirected himself in finding that there was mens rea possession and in invoking the presumption of possession under s 37(d) of the Act at the same time.

Finding of trafficking without finding of possession

[34] Learned DPP conceded that the learned trial judge made no finding of possession before he ruled on trafficking. What transpired here was the learned trial judge took the 'reverse approach' whereby he first ruled that the appellant was trafficking in the dangerous drugs under s 2 of the Act followed by his finding that the appellant was in possession of the said drugs. Learned DPP contended that the finding of trafficking and possession was a situation of 'chicken and egg' which did not result in any error or misdirection by the learned trial judge.

[35] We disagreed with learned DPP. It is trite that to prove a charge of

trafficking under s 39B(1)(a) of the Act punishable under s 39B(2) thereof, it is essential to prove trafficking of the dangerous drugs and in proving trafficking, the prosecution must first prove possession of the said drugs, be it under s 37(d) of the Act or mens rea possession. In *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, Lord Diplock said at p 68:

> ... the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept involving transfer of possession, is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking 'transport' is sandwiched between 'sell, give, administer' which precede it and 'send, deliver or distribute' which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person.

[36] Since the act of trafficking entails the transfer of possession, it must necessarily mean that possession is a pre-requisite element to be established before trafficking can be made out.

[37] Based on the aforesaid, we were of the view that the learned trial judge erred in law in finding that the appellant was trafficking without first making a ruling that the appellant had possession of the dangerous drugs. We were further of the view that in the circumstances, the finding of trafficking was flawed and without legal basis, warranting appellate intervention.

CONCLUSION

[38] We therefore unanimously allowed the appeal. We set aside the conviction and sentence of the High Court and we substituted with an order of conviction and sentence as set out in para [2] above.

Order accordingly.

Reported by Dzulqarnain Ab Fatar